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No. 77-139

In the Supreme Court of the United States

OCTOBER TERM, 1977

DUDLEY D. MORGAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
JOHN H. BURNES, JR.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 554 F. 2d 31.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1977. A petition for rehearing was denied on June 29, 1977 (Pet. App. A8). The petition for a writ of certiorari was filed on July 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was improperly prejudiced by questioning that elicited that defense character witnesses would have had a different opinion of petitioner's integrity if he had engaged in securities fraud.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of 11 counts of mail fraud and of two counts of engaging in fraudulent, deceptive, and manipulative securities transactions, in violation of 18 U.S.C. 1341 and 15 U.S.C. 77q(a) and 78j(b). He was sentenced to two years' imprisonment, 22 months of which were suspended.

The facts are set out in the opinion of the court of appeals (Pet. App. A2-A3). Petitioner was the managing partner of a securities brokerage firm in Tulsa, Oklahoma. Between May and July of 1972 he sold a quantity of stock in Display Sciences, Inc., a New York corporation engaged in the design and manufacture of large screen television projection equipment, without disclosing the fact that the stock was unregistered or that the company was in receivership. Petitioner also misstated the number of shares outstanding and the status of negotiations between the company and the State of Connecticut for a contract covering off-track betting installations.

Petitioner contended that he had relied upon misinformation supplied to him by the management of Display Sciences and had passed on this information to his customers and salesmen, unaware that it was materially incomplete or false. Petitioner produced five witnesses who testified favorably concerning petitioner's reputation for honesty, integrity and truthfulness and their own opinions about petitioner's possession of these character traits.

On cross-examination of three of these witnesses, the prosecutor asked the following hypothetical question designed to probe the witness's opinion: "[I]f [petitioner]

knew that Display Sciences was in receivership at the time he was selling these shares of Display Sciences stock between May and July 1972 and didn't tell that to his customers, would your opinion of him change at all?" (Tr. 763, 854, 869). Each witness stated that on this assumption his favorable opinion of petitioner would change (*ibid.*).

The court of appeals acknowledged (Pet. App. A4) that a number of cases had held such hypothetical questions to be improper. The court of appeals joined these other courts, holding that "the probative value of a hypothetical question such as the one at issue herein is negligible and * * * it should not be asked" (*id.* at A6). It affirmed petitioner's conviction, however, because the hypothetical question "introduced nothing into the case which was not already before the jury" (*ibid.*) and consequently did not prejudice petitioner.

ARGUMENT

Petitioner contends that it was improper for the district court to allow the prosecutor to ask his character witnesses a hypothetical question that assumed that petitioner committed the crime with which he was charged. He contends that the question deprived him of his presumption of innocence.

The court of appeals disapproved the question that was asked (Pet. App. A6). This case therefore does not present any conflict among the circuits concerning the propriety of such a question. The court of appeals held only that the hypothetical question did not prejudice petitioner, because it did not place before the jury any arguments or evidence that were not already there. That essentially factual decision is correct, and there is no need for this Court to review it.

In any event, petitioner's argument that hypothetical questions such as the one at issue here invariably undermine the presumption of innocence does not bear scrutiny. The district court has substantial discretion in controlling the scope of cross-examination of a character witness. *Michelson* v. *United States*, 335 U.S. 469, 480; *United States* v. *Madrid Ramirez*, 535 F. 2d 125, 128-129 (C.A. 1); *United States* v. *Lewis*, 482 F. 2d 632, 642 (C.A.D.C.). The hypothetical question in this case was based solely upon evidence that was already before the jury. This reference to already-introduced evidence did not affect the presumption of innocence. The district court carefully instructed the jury on the presumption of innocence and the government's burden of proving petitioner's guilt beyond a reasonable doubt (Tr. 1103-1104). The court also told the jury that character evidence alone could establish a reasonable doubt (Tr. 1140); this instruction was more favorable to petitioner than the law requires where, as here, the defense did not rest solely on character evidence. See *Oertle* v. *United States*, 370 F. 2d 719, 727 (C.A. 10), certiorari denied, 387 U.S. 943; *United States* v. *Minieri*, 303 F. 2d 550, 555 (C.A. 2).

The decision below does not conflict with the Fifth Circuit's ruling in *United States* v. *Candelaria-Gonzalez*, 547 F. 2d 291. As we have pointed out, the court below, like the court in *Candelaria-Gonzalez*, disapproved the hypothetical question. The cases also are distinguishable. *Candelaria-Gonzalez* held that it was error to ask, on cross-examination of a character witness who had testified concerning the defendant's general reputation *in the community*, whether that general reputation would be affected if the defendant were convicted of the crime with which he was charged. Here, by contrast, petitioner's character witnesses testified not

only concerning petitioner's general reputation in the community but also concerning their personal opinions. When a character witness states his own opinion of a defendant's character, as he is now permitted to do under Fed. R. Evid. 405(a), "some latitude in cross-examination must be allowed" to explore the basis of that opinion (Pet. App. A4). The witness could discuss his own reactions to hypothetical facts. But if, as in *Candelaria-Gonzalez*, a witness testifies only concerning what he has heard about a defendant's reputation in the community, he may not properly discuss the community reaction to a conviction; the character witness in such a case "had heard nothing in the community about [the defendant's] post conviction reputation when he had been convicted of nothing whatsoever. No one yet knew what people would say about him if he were convicted" (547 F. 2d at 294).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
JOHN H. BURNES, JR.,
Attorneys.

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